

Testimony of
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Statement of Glenn A. Fine Inspector General, U.S. Department of Justice, before the Senate Committee on the Judiciary concerning The FBI's Use of National Security Letters and Section 215 Requests for Business Records

Mr. Chairman, Senator Specter, and members of the Committee on the Judiciary:

Thank you for inviting me to testify about two recent reports issued by the Department of Justice Office of the Inspector General (OIG) regarding the Federal Bureau of Investigation's (FBI) use of national security letters and the FBI's use of Section 215 orders to obtain business records. In the Patriot Reauthorization Act, enacted in 2006, Congress directed the OIG to examine the FBI's use of these two important authorities. The reviews were directed to examine, among other things, the number of times these authorities were used, the importance of the information obtained, how the information was utilized, any improper or illegal uses of these authorities, and other noteworthy facts or circumstances related to their use.

On March 9, 2007, we issued separate reports on the FBI's use of national security letters and Section 215 orders. We publicly released two unclassified reports, with only limited information redacted (blacked out) which the Department or the FBI considered to be classified. We also provided to Congress, including this Committee, copies of the full classified reports that contain some additional classified information on the FBI's use of the two authorities. However, the OIG's main findings and conclusions are included in the unclassified versions that were publicly released.

In this written statement, I will summarize the key findings from our reports, focusing most of my comments on the national security letters report. I will first provide brief background on national security letters and how we conducted our review. I will then provide a few observations to put our findings in context. Next, I will highlight the main findings of our national security letter report. After that, I will briefly summarize our report on the FBI's use of Section 215 orders to obtain business records.

I. THE OIG'S NATIONAL SECURITY LETTER REPORT

A. Background on National Security Letters

Under five statutory provisions, the FBI can use national security letters (NSLs) to obtain - without a court order or any review by a court - records such as customer information from telephone companies, Internet service providers, financial institutions, and consumer credit companies. Most of these statutory provisions regarding NSLs existed prior to enactment of the USA PATRIOT Act (Patriot Act) in October 2001. Prior to the Patriot Act, the FBI could obtain information using a national security letter only if it had "specific and articulable facts giving reason to believe that the customer or entity whose records are sought [was] a foreign power or

agent of a foreign power." In addition, NSLs could only be issued by a limited number of senior FBI Headquarters officials.

The Patriot Act significantly broadened the FBI's authority to use NSLs by both lowering the threshold standard for issuing them and by expanding the number of FBI officials who could sign the letters. First, the Patriot Act eliminated the requirement that the information sought must pertain to a foreign power or an agent of a foreign power. Instead, it substituted the lower threshold standard that the information requested must be relevant to or sought for an investigation to protect against international terrorism or espionage. Consequently, the Patriot Act authorized the FBI to issue national security letters to request information about persons other than the subjects of FBI national security investigations, so long as the requested information is relevant to an authorized national security investigation.

In addition, the Patriot Act permitted Special Agents in Charge of the FBI's 56 field offices to sign national security letters, which significantly expanded approval authority beyond a limited number of FBI Headquarters officials. Finally, the Patriot Act added a new authority allowing NSLs to be used to obtain consumer full credit reports in international terrorism investigations.

B. The OIG Review

As directed by the Patriot Reauthorization Act, the OIG's report examined the FBI's use of national security letters during the time period from 2003 through 2005. As required by the Reauthorization Act, the OIG will conduct another review examining the use of NSLs in 2006, which we are required to issue by the end of this year.

During our review, a team of OIG staff conducted interviews of over 100 FBI and Department of Justice employees, including personnel at FBI Headquarters, the FBI Office of the General Counsel (OGC), FBI Counterterrorism and Counterintelligence Divisions, FBI personnel in four field divisions, and officials in the Department's Criminal Division.

In addition, the OIG reviewed a sample of FBI case files that contained national security letters at four FBI field divisions: Chicago, New York, Philadelphia, and San Francisco. These field divisions were selected from among the eight FBI field divisions that issued the most NSL requests during the review period. During our field work at the four field divisions, we examined a sample of 77 investigative case files that contained 293 national security letters. An investigative case file can contain a large number of documents, and some of the case files we reviewed consisted of the equivalent of 20 or 30 boxes of documents. We used a judgmental sample in selecting which files to review and included in our sample both counterterrorism and counterintelligence cases, cases in which the NSLs were issued during preliminary investigations and full investigations, and opened and closed FBI cases.

The OIG also analyzed the FBI OGC's national security letter tracking database, which the FBI uses for collecting information to compile the Department's required reports to Congress on NSL usage. Finally, we distributed an e-mail questionnaire to the counterintelligence and counterterrorism squads in the FBI's 56 field divisions in an effort to determine the types of analytical products the FBI developed based on NSLs, the manner in which NSL-derived

information was disseminated, and the occasions when such information was provided to law enforcement authorities for use in criminal proceedings.

C. Findings of the OIG Review

Our review found widespread and serious misuse of the FBI's national security letter authorities. In many instances, the FBI's misuse of national security letters violated NSL statutes, Attorney General Guidelines, or the FBI's own internal policies. We also found that the FBI did not provide adequate guidance, adequate controls, or adequate training on the use of these sensitive authorities. In many respects, the FBI's oversight of the use of NSL authorities expanded by the Patriot Act was inconsistent and insufficient.

1. Background to OIG Findings

However, before detailing the main findings of our report, I believe it is important to provide context for these findings and also to note what our review did not find.

First, in evaluating the FBI's misuse of national security letters, it is important to recognize the significant challenges the FBI was facing during the period covered by our review. After the September 11 terrorist attacks, the FBI implemented major organizational changes to prevent additional terrorist attacks in the United States. These changes included overhauling and expanding its counterterrorism operations, expanding its intelligence capabilities, attempting to upgrade its information technology systems, and seeking to improve coordination with state and local law enforcement agencies. These changes occurred while the FBI and its Counterterrorism Division had to respond to continuing terrorist threats and conduct many counterterrorism investigations, both internationally and domestically.

Second, it is important to recognize that in most - but not all - of the cases we examined in this review, the FBI was seeking information that it could have obtained properly through national security letters if it had followed applicable statutes, guidelines, and internal policies.

Third, national security letters are important tools that can provide critical evidence in counterterrorism and counterintelligence investigations. Many Headquarters and field personnel - from agents to senior officials - believe these tools are indispensable to the FBI's mission to detect and deter terrorism and espionage.

Fourth, we did not find that that FBI agents sought to intentionally misuse the national security letters or sought information that they knew they were not entitled to obtain through the letters. Instead, we believe the misuses and the problems we found were the product of mistakes, carelessness, confusion, sloppiness, lack of training, lack of adequate guidance, and lack of adequate oversight.

Yet, I do not believe that any of these observations excuse the FBI's widespread and serious misuse of its national security letter authorities. When the Patriot Act enabled the FBI to obtain sensitive information through NSLs on a much larger scale, the FBI should have established sufficient controls and oversight to ensure the proper use of these authorities. The FBI did not do so. The FBI's failures, in my view, were serious and unacceptable.

I would now like to highlight our review's main findings, which are detailed in the OIG's 126-page report.

2. OIG Findings

Our review found that, after enactment of the Patriot Act, the FBI's use of national security letters increased dramatically. In 2000, the last full year prior to passage of the Patriot Act, the FBI issued approximately 8,500 NSL requests. It is important to note that one national security letter may request information about multiple telephone numbers or e-mail addresses. Because the FBI's semiannual classified reports to Congress provide the number of requests rather than the number of letters, we also focused on the total number of requests.

After the Patriot Act, the number of NSL requests issued by the FBI increased to approximately 39,000 in 2003, approximately 56,000 in 2004, and approximately 47,000 in 2005. In total, during the 3-year period covered by our review, the FBI issued more than 143,000 NSL requests.

However, we believe that these numbers, which are based on information from the FBI's database, understate the total number of NSL requests issued by the FBI. During our review, we found that the FBI database used to track these requests is inaccurate and does not include all NSL requests.

First, when we compared information from the database to the documents contained in investigative case files in the 4 FBI field offices that we visited, we found approximately 17 percent more NSL letters and 22 percent more NSL requests in the case files than we could find in the FBI database. In addition, we determined that many NSL requests were not included in the Department's reports to Congress because of the FBI's delays in entering NSL information into its database. We also found problems and incorrect data entries in the database that caused NSLs to be excluded from the Department's reports to Congress.

Therefore, based on shortcomings in the FBI's NSL database and its reporting processes, we concluded that the Department's semiannual classified reports to Congress on NSL usage were inaccurate and significantly understated the total number of NSL requests during the review period.

Our report also provides breakdowns on the types of NSLs used by the FBI. We determined that, overall, approximately 73 percent of the total number of NSL requests were used in counterterrorism investigations and 26 percent in counterintelligence cases.

In addition, our review found that the percentage of NSL requests that related to investigations of U.S. persons increased from about 39 percent of all NSL requests in 2003 to about 53 percent in 2005.

As directed by the Patriot Reauthorization Act, our review attempted to assess the effectiveness of national security letters. NSLs have various uses, including to develop evidence to support applications for orders issued under the Foreign Intelligence Surveillance Act (FISA), develop links between subjects of FBI investigations and other individuals, provide leads and evidence to allow FBI agents to initiate or close investigations, and corroborate information obtained by

other investigative methods. FBI personnel told the OIG that NSLs are indispensable investigative tools in many counterterrorism and counterintelligence investigations, and they provided us with examples and evidence of their importance to these investigations.

We determined that information obtained from NSLs is also used in FBI analytical intelligence products that are shared within the FBI and with DOJ components, Joint Terrorism Task Forces, other federal agencies, and other members of the intelligence community.

In addition, information obtained from NSLs is stored in FBI databases such as its Automated Case Support system and its Investigative Data Warehouse. However, because information is not tagged or identified in FBI files or databases as derived from NSLs, we could not determine the number of times that NSLs were used in such analytical products, shared with other agencies, or used in criminal cases.

As also directed by the Patriot Reauthorization Act, the OIG review examined whether there were any "improper or illegal uses" of NSL authorities. We found that from 2003 through 2005, the FBI identified 26 possible intelligence violations involving its use of NSLs, 19 of which the FBI reported to the President's Intelligence Oversight Board (IOB). Of the 26 possible violations, 22 were the result of FBI errors, while 4 were caused by mistakes made by recipients of the NSLs.

These possible violations included the issuance of NSLs without proper authorization, improper requests under the statutes cited in the NSLs, and unauthorized collection of telephone or Internet e-mail transactional records. For example, in three of these matters the FBI obtained the information without issuing national security letters. One of these three matters involved receipt of information when there was no open national security investigation. In another matter, the FBI issued national security letters seeking consumer full credit reports in a counterintelligence investigation, which the NSL statutes do not permit. In other matters, the NSL recipient provided more information than was requested in the NSL, or provided information on the wrong person, either due to FBI typographical errors or errors by the recipients of NSLs.

In addition to the possible violations reported by the FBI, we reviewed FBI case files in four field offices to determine if there were unreported violations of NSL authorities, Attorney General Guidelines, or internal FBI policies governing the approval and use of NSLs. Our review of 293 national security letters in 77 files found 22 possible violations that had not been identified or reported by the FBI.

The violations we found fell into three categories: improper authorization for the NSL, improper requests under the pertinent national security letter statutes, and unauthorized collections. Examples of the violations we identified include issuing NSLs for consumer full credit reports in a counterintelligence case, which is not statutorily permitted; issuing an NSL for a consumer full credit report when the FBI Special Agent in Charge had approved an NSL for more limited credit information under a different NSL authority; issuing an NSL when the investigation had lapsed; and obtaining telephone toll billing records for periods in excess of the time period requested in the NSL due to third-party errors.

Thus, it is significant that in the limited file review we conducted of 77 investigative files in 4 FBI field offices, we identified nearly as many NSL-related violations (22) as the total number of possible violations that the FBI had identified (26) in reports from all FBI Headquarters and field divisions over the entire 3-year period. Moreover, 17 of the 77 files we reviewed, or 22 percent, had 1 or more violations.

We have no reason to believe that the number of violations we identified in the four field offices we visited was skewed or disproportionate to the number of possible violations in other files. This suggests that a large number of NSL-related violations throughout the FBI have not been identified or reported by FBI personnel.

Our examination of the violations we identified did not reveal deliberate or intentional violations of the NSL statutes, the Attorney General Guidelines, or FBI policy. We believe that some of these violations demonstrated FBI agents' confusion and unfamiliarity with the constraints on national security letter authorities. We also believe that many of the violations occurred because FBI personnel do not consistently cross check the NSL approval documentation with the proposed NSLs, or verify upon receipt that the information supplied by the recipient matches the request. Other violations demonstrated inadequate supervision over use of these authorities.

We examined the FBI investigative files in the four field offices to determine whether FBI case agents and supervisors had adhered to FBI policies designed to ensure appropriate supervisory review of the use of NSL authorities. We found that 60 percent of the investigative files we examined contained one or more violations of FBI internal policies relating to national security letters. These included failures to document supervisory review of NSL approval memoranda and failures to include in NSL approval memoranda required information, such as the authorizing statute, the status of the investigative subject, or the number or types of records requested.

In another finding, our review determined that the FBI Headquarters Counterterrorism Division generated over 300 NSLs exclusively from "control files" rather than from "investigative files," in violation of FBI policy. When NSLs are issued from control files, the NSL documentation does not indicate whether the NSLs are issued in authorized investigations or whether the information sought in the NSLs is relevant to those investigations. This documentation is necessary to establish compliance with NSL statutes, Attorney General Guidelines, and FBI policies.

In addition, we found that the FBI had no policy requiring the retention of signed copies of national security letters. As a result, we were unable to conduct a comprehensive audit of the FBI's compliance with its internal control policies and the statutory certifications required for NSLs.

In one of the most troubling findings, we determined that from 2003 through 2005 the FBI improperly obtained telephone toll billing records and subscriber information from 3 telephone companies pursuant to over 700 so-called "exigent letters." These letters generally were signed by personnel in the Communications Analysis Unit (CAU), a unit of the Counterterrorism Division in FBI Headquarters, and were based on a form letter used by the FBI's New York Field Division in the criminal investigations related to the September 11 attacks. The exigent letters signed by the CAU typically stated:

Due to exigent circumstances, it is requested that records for the attached list of telephone numbers be provided. Subpoenas requesting this information have been submitted to the U.S. Attorney's Office who will process and serve them formally to [information redacted] as expeditiously as possible.

These letters were signed by CAU Unit Chiefs, CAU special agents, and subordinate personnel, none of whom were delegated authority to sign NSLs.

Our review found that the FBI sometimes used these exigent letters in non-emergency circumstances. In addition, the FBI failed to ensure that there were duly authorized investigations to which the requests could be tied. The exigent letters also inaccurately represented that the FBI had already requested subpoenas for the information when, in fact, it had not. The FBI also failed to ensure that NSLs were issued promptly to the telephone companies after the exigent letters were sent. Rather, in many instances, after obtaining records from the telephone companies the FBI issued national security letters many months after the fact to "cover" the information obtained.

As our report describes, we were not convinced by the legal justifications offered by the FBI during our review for the FBI's acquisition of telephone toll billing records and subscriber information in response to the exigent letters without first issuing NSLs. The first justification offered was the need to reconcile the strict requirements of the NSL statute with the FBI's mission to prevent terrorist attacks. While the FBI's counterterrorism mission may require streamlined procedures to ensure the timely receipt of information in genuine emergencies, the FBI needs to address the problem by expediting the issuance of national security letters or by seeking legislative modification to the voluntary emergency disclosure provision in the Electronic Communications Privacy Act (ECPA), not through these exigent letters. Moreover, the FBI's justification for the exigent letters was undercut because they were used in non-emergency circumstances, not followed in many instances within a reasonable time by the issuance of NSLs, and not catalogued in a fashion that would enable FBI managers or anyone else to review the practice or the predication required by the NSL statute.

In sum, we concluded that the FBI's use of these letters inappropriately circumvented the requirements of the NSL statute, and violated Attorney General Guidelines and FBI policies.

As directed by the Patriot Reauthorization Act, our report also describes several other "noteworthy facts or circumstances" we identified in the review. For example, we found that the FBI did not provide clear guidance describing how FBI case agents and supervisors should apply the Attorney General Guidelines' requirement to use the "least intrusive collection techniques feasible" during national security investigations to the use and sequencing of national security letters. In addition, we saw indications that some FBI lawyers in field offices were reluctant to provide an independent review of NSL requests because these lawyers report to senior field office managers who already had approved the underlying investigations.

D. Recommendations

To help the FBI address these significant findings, the OIG made a series of recommendations, including that the FBI improve its database to ensure that it captures timely, complete, and accurate data on NSLs; that the FBI take steps to ensure that it uses NSLs in full accord with the

requirements of national security letter authorities; and that the FBI issue additional guidance to field offices that will assist in identifying possible violations arising from use of NSLs. The FBI concurred with all of the recommendations and agreed to implement corrective action.

We believe that the Department and the FBI are taking the findings of the report seriously. In addition to concurring with all our recommendations, the FBI and the Department have informed us that they are taking additional steps to address the problems detailed in the report. For example, the FBI's Inspection Division has initiated audits of a sample of NSLs issued by each of its 56 field offices. It is also conducting a special inspection of the exigent letters sent by the Counterterrorism Division to three telephone companies to determine how and why that occurred.

The FBI's Office of the General Counsel is also consolidating its guidance on NSLs, providing additional guidance and training to its field-based Chief Division Counsel on their role in approving NSLs, and working to develop a new web-based NSL tracking database.

In addition to the FBI's efforts, we have been told that the Department's National Security Division will be actively engaged in oversight of the FBI's use of NSL authorities.

As required by the Patriot Reauthorization Act, the OIG will continue to review the FBI's use of national security letters. We are required by the Act to issue another report by the end of this year on the FBI's use of NSLs in 2006. In addition, we intend to monitor the actions that the FBI and the Department have taken and are taking to address the problems we found in our first review.

II. THE OIG'S SECTION 215 REPORT

In the last section of my statement, I want to summarize briefly the OIG's second report, which examined the FBI's use of Section 215 orders to obtain business records. Section 215 of the Patriot Act allows the FBI to seek an order from the FISA Court to obtain "any tangible thing," including books, records, and other items, from any business, organization, or entity provided the item or items are for an authorized investigation to protect against international terrorism or clandestine intelligence activities.

Section 215 of the Patriot Act did not create new investigative authority, but instead significantly expanded existing authority found in FISA by broadening the types of records that could be obtained and by lowering the evidentiary threshold to obtain a Section 215 order for business records. Public concerns about the scope of this expanded Section 215 authority centered on the ability of the FBI to obtain library records, and many public commentators began to refer to Section 215 as the "library provision."

Our review found that the FBI and the Department's Office of Intelligence Policy and Review (OIPR) submitted to the FISA Court two different kinds of applications for Section 215 orders: "pure" Section 215 applications and "combination" Section 215 applications. A "pure" Section 215 application is a term used to refer to a Section 215 application for any tangible item which is not associated with an application for any other FISA authority. A "combination" Section 215 application is a term used to refer to a Section 215 request that was added to a FISA application for pen register/trap and trace orders, which identify incoming and outgoing telephone numbers called on a particular line. In a combination order, the Section 215 request was added to the pen

register/trap and trace application in order to obtain subscriber information related to the telephone numbers.

We found that from 2002 through 2005 the Department, on behalf of the FBI, submitted to the FISA Court a total of 21 pure Section 215 applications and 141 combination Section 215 applications.

We found that the first pure Section 215 order was approved by the FISA Court in spring 2004, more than 2 years after enactment of the Patriot Act. The FISA Court approved six more pure Section 215 applications that year, for a total of seven in 2004. The FISA Court approved 14 pure Section 215 applications in 2005.

Examples of the types of business records that were obtained through pure Section 215 orders include driver's license records, public accommodations records, apartment records, and credit card records.

We also determined that the FBI did not obtain Section 215 orders for any library records from 2002 through 2005 (the time period covered by our review). The few applications for Section 215 orders for library records that were initiated in the FBI during this period were withdrawn while undergoing the review process within the FBI and the Department. None were submitted to the FISA Court.

With respect to how information from Section 215 orders was used, we found no instance where the information obtained from a Section 215 order resulted in a major case development such as disruption of a terrorist plot. We also found that very little of the information obtained in response to Section 215 orders has been disseminated to intelligence agencies outside the DOJ.

However, FBI personnel told us they believe that the kind of intelligence gathered from Section 215 orders is essential to national security investigations. They also stated that the importance of the information is sometimes not known until much later in an investigation, when the information is linked to some other piece of intelligence. FBI officials and Department attorneys also stated that they believe Section 215 authority is useful because it is the only compulsory process for certain kinds of records that cannot be obtained through alternative means.

We did not identify any instances involving "improper or illegal use" of a pure Section 215 order. We did find problems with two combination Section 215 orders. In one instance, the FBI inadvertently collected information from a telephone number that no longer belonged to the target of the investigation. In another instance, the FBI received information from a telephone that was no longer connected to the subject because of a mistake by the telephone company.

We also found that the FBI has not used Section 215 orders as effectively as it could have because of legal, bureaucratic, or other impediments to obtaining these orders. For example, after passage of the Patriot Act in October 2001, neither the Department nor the FBI issued implementing procedures or guidance with respect to the expansion of Section 215 authority for a long period of time. In addition, we found significant delays within the FBI and the Department in processing requests for Section 215 orders. We also determined through our interviews that FBI field offices do not fully understand Section 215 orders or the process for obtaining them.

III. CONCLUSION

In sum, our review of national security letters revealed that, in various ways, the FBI violated the national security letter statutes, Attorney General Guidelines, or FBI internal policies governing their use. While we did not find that the violations were deliberate, we believe the misuses were widespread and serious.

Finally, I also want to note that the FBI and the Department cooperated fully with our review. In addition, the FBI and the Department agreed to declassify important aspects of the report to permit a full and fair airing of the issues we describe in the report. They have also acknowledged the problems we found and have not attempted to cover up the deficiencies. The FBI and the Department also appear to be taking the findings of the report seriously, and appear committed to correcting the problems we identified.

We believe that these serious and ongoing efforts are necessary to ensure that the FBI's use of national security letter authorities to obtain sensitive information is conducted in full accord with the NSL statutes, Attorney General Guidelines, and FBI policies.

That concludes my testimony, and I would be pleased to answer any questions.